

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 14329
(Application 20545 and
Application 26726

BAXTER RANCH,

Permittees and Applicants

ORDER: WR 92-04

SOURCE: Birch, Tinemaha and
Red Mountain Creeks

COUNTY: Inyo

ORDER DENYING PETITION FOR RECONSIDERATION OF ORDER WR 92-01 BY THE BOARD

1.0 INTRODUCTION

The State Water Resources Control Board (State Water Board) having adopted Order WR 92-01 Revoking Permit 14329 (Application 20545) and Canceling Application 26726 on March 19, 1992; the State Water Board having received a timely petition for reconsideration from the Baxter's (dba Baxter Ranch, petitioners), and the State Water Board having considered the petition, finds as follows:

2.0 GROUNDS FOR RECONSIDERATION

Water Code Section 1357 provides that any person interested in any application or permit affected by an Order adopted by the State Water Board may petition the State Water Board for reconsideration. Water Code Section 1358 states that the order may be reconsidered by

the board on all the pertinent parts of the record and such argument as may be permitted, or a further hearing may be held, upon notice to all interested persons, for the purpose of receiving such additional evidence as the board may, for cause, allow.

Section 768 of Title 23, California Code of Regulations (Regulations) provides that reconsideration of a Board Order may be requested for any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

Section 769 requires submittal of specific information in support of a petition. It provides, in part, that:

- (a) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

(b) If reconsideration is requested based in whole or in part on Section 768, the petition shall include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the board and the reason it was not presented. A general statement of the nature of the evidence and of the facts to be proved shall also be included.

(c) The petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.

3.0 SUMMARY OF PETITION

On or about April 20, 1992, the State Water Board received a petition for reconsideration alleging that: Order WR 92-01 is written in an unfair and abusive manner because the Board did not have all of the facts before it prior to adoption of the Order; the Order is not supported by evidence based upon existing law at the time of permit issuance; there is relevant evidence which could not have been produced during the September 28, 1990 hearing and is now available; and, the 1976 public notice of the project was in error.

The petitioner requests that Order WR 92-01 be revised to eliminate the Order denying the Petition for Extension of Time to complete construction and apply water to full beneficial use under Permit 14329 and also eliminate the Order revoking Permit 14329.

The basis for the petitioners' requests are:

1. The permit was issued on April 29, 1964 pursuant to the laws in effect at that time. The petitioner contends the project should have been reviewed pursuant to the laws of diligence in effect at the time of permit issuance and not the regulations now in effect.
2. The petitioner contends that the Board cannot revoke a permit issued pursuant to a Board decision because such action would contradict the Board's prior finding that issuance of the permit was appropriate.
3. The petitioner contends that the information requested by the Division in a March 7, 1990 letter was not available at the time of the September 28, 1990 hearing, is now available and is evidence that the State Water Board should now consider.
4. The petitioner contends that access to the U.S. Bureau of Land Management (BLM) property needed to construct the project facilities will eventually be obtained. The ongoing lack of access is outside of the control of the Baxter Ranch and should not be used to determine whether the permit can be maintained.

5. The petitioner maintains that the Division's decision to publicly notice a 1976 Petition for Extension of Time (which resulted in the filing of protests by various parties) was in error. Since the permit was issued pursuant to Board Decision 1154, public notice was not required.

4.0 REVOCATION OF PERMIT 14329 AND CANCELLATION OF APPLICATION 26726 IS
IN ACCORDANCE WITH STATE LAW

The petitioner contends that the State Water Board cannot revoke its permit and cancel the underlying application based on existing law. Water Code Section 1410 authorizes the revocation of permits for the lack of due diligence by the permittee for failing to commence, prosecute and complete the works necessary to put water to beneficial use. Language similar in form and effect has been in effect since 1914.

Permit 14329 was issued in 1964. The permit included a condition stating that the issuance of the permit did not confer a right of access to the point of diversion on federal lands. During the succeeding years the permittee failed to obtain the right to construct and operate its project on federal lands.

The State Water Board can only act on existing applications and permits on the basis of the law currently in effect. Clearly the permittee failed to act with diligence and the revocation of Permit 14329 and the cancellation of Application 26726 by Order WR 92-1 is appropriate.

5.0 THE WATER CODE AUTHORIZES THE REVOCATION OF PERMITS AND THE CANCELLATION OF APPLICATION

Petitioner contends that a permit issued pursuant to a water right decision cannot be revoked by the State Water Board. Although the argument in support of this contention is not entirely clear, it appears that the Petitioner views the permits as being a contract between it and the State Water Board.

This is incorrect^{1/}. The California Water Code makes it clear that a water right permit is a highly conditional right and not a contract. By way of illustration, Section 1381 provides that "...a permit gives the right to take and use water only to the extent and for the purpose allowed...." And Section 1390 provides that "[a] permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial

^{1/} Even contracts are unenforceable if the complaining party has failed to perform his part of the contract.

purpose...." Finally, as previously stated, Section 1410 authorizes the revocation of permit for the lack of diligence by the permittee for failing to commence, prosecute and complete the works necessary to put water to beneficial use.

Section 769 of State Water Board regulations requires that the legal issues raised in petitions for reconsideration be accompanied by a statement of points and authorities. The petitioner failed to submit a statement of points and authorities with its petition for reconsideration for this issue and is dismissed on that basis^{2/}.

6.0 THE PETITIONER FAILED TO DEMONSTRATE THAT NEW EVIDENCE IS AVAILABLE THAT COULD NOT HAVE BEEN PRODUCED IN THE EXERCISE OF REASONABLE DILIGENCE AT THE HEARING

The evidentiary hearing for this matter was held on September 28, 1990. On March 7, 1990, six months prior to the hearing, the Division of Water Rights made a written request that the Petitioner submit information to demonstrate that the project was being diligently developed and to provide information in support of the Petitioner's

^{2/} The permittee also failed to comply with the requirement that petitions for reconsideration be accompanied by a statement that copies of the petition and any accompanying materials be sent to all interested parties in accordance with Section 769. Further, it appears that several interested parties such as the California Department of Fish and Game and the U.S. Bureau of Land Management were not supplied copies of the petition for reconsideration and accompanying materials.

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request for a time extension. More specifically, the Petitioner was requested to submit the following information: (1) a showing of diligence including plans; (2) a development schedule; (3) a showing of economic feasibility; and (4) availability of financing. The Petitioner failed to produce that evidence either before or during the evidentiary hearing.

The petitioner alleges that this information and other information was available for the March 19, 1992 State Water Board meeting during which Order WR 92-1. The information was not presented during the March 19, 1992 meeting because the hearing record was closed at the conclusion of the September 28, 1990 evidentiary hearing.

The new evidence identified by the petitioner is (1) itemization of money spent on the project; (2) list of material on hand, and required; (3) financial feasibility and capability; and (4) completion schedule. The petitioner contends that this evidence should have been considered by the State Water Board.

Assuming the factual allegations are true, the petitioner's argument is rejected for the following reasons. On the face of this matter, it is extremely difficult to conclude that the information could not have been produced in the exercise of reasonable diligence at the time of the evidentiary hearing inasmuch as the Division of Water Rights requested essentially the same information six months in

advance of the hearing. In addition, the petitioner failed to accompany its petition for reconsideration with an affidavit or declaration under penalty of perjury stating that additional evidence is available that could not have been presented in the exercise of reasonable diligence at the evidentiary hearing on September 28, 1990 as required by Section 768 and 769 of our regulations.

7.0 SPECULATION THAT BUREAU OF LAND MANAGEMENT WILL GRANT ACCESS TO THE PETITIONER IN THE FUTURE IS NOT GROUNDS FOR RECONSIDERATION

The Petitioner maintains that the Bureau of Land Management (BLM) will eventually allow access to federal lands and that the lack of access should not be used to determine whether the permit should be revoked.

Whether the Bureau of Land Management will ever grant the Petitioner permission to use federal lands is speculative. Such speculation is not grounds for reconsideration under Section 768 which authorizes reconsideration for the following causes: irregularity in the proceedings, abuse of discretion, the absence of substantial evidence, new evidence that could not have been produced with reasonable diligence, or error in law. After twenty-six years of not being able to obtain permission to use federal lands, the petitioners' mere speculation that BLM will eventually allow access to federal lands is not grounds for reconsideration under Section 768.

8.0 SPECULATION THAT PROJECT COULD HAVE MOVED FORWARD IF THE 1976 PETITION FOR EXTENSION OF TIME HAD NOT BEEN PUBLICLY NOTICED AND SUBSEQUENTLY PROTESTED IS NOT GROUNDS FOR RECONSIDERATION

The Petitioner does not present a clear statement of the issue and argument in support of this contention. It appears that the Petitioner is contending that the project could have moved forward in a diligent manner if a 1976 Petition for Extension of Time had not been publicly noticed and subsequently protested.

On September 17, 1974, the Petitioner filed a Petition for Extension of Time which requested an extension of time until December 1, 1976 to complete construction and put the water to beneficial use. Notice was given that the Petitioner was seeking a time extension for its project. Six protests to the petition were received by the State Water Board. The protests were not resolved. No further action was taken on the petition because the permittee was in the process of modifying the project and filing a new application to appropriate water for another hydroelectric power project.

Section 843 of the Regulations states that notice of a petition for extension of time under a permit shall be given or published in such a manner as may be prescribed by the State Water Board. Petitions which will not ordinarily require notice must meet the following criteria:

- (a) Construction of the project has commenced or a substantial financial commitment for construction or for land acquisition has been undertaken;

- (b) The project is not in an area where there is usual competition for or interest in water; and
- (c) The project is not a large multi-stage project which may be behind schedule.

The 1974 petition did not meet these criteria since the project is located in an area where there is competition for and interest in water. The protests to the petition and earlier protests of Application 20545 prior to permit issuance are evidence of such competition and interest.

As previously noted, reconsideration is provided for the following causes: irregularity in the proceedings, abuse of discretion, the absence of substantial evidence, and new evidence (Section 768). Speculation that the project could have moved forward if the 1976 petition for time extension had not been publically noticed is not a valid grounds for reconsideration and the contention is rejected.

9.0 CONCLUSIONS

The Petition for Reconsideration does not qualify under any cause stated in Section 768 of the Regulations. Therefore, the petition should be denied.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT the petition for reconsideration of Baxter Ranch is denied.

CERTIFICATION

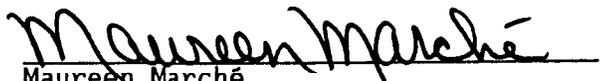
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 18, 1992.

AYE: W. Don Maughan
John Caffrey
Marc Del Piero
James M. Stubchaer

NO: None

ABSENT: Eliseo M. Samaniego

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board